



Understanding Dementia and the Legal Consequences

Presented by:

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- Our Private Client team are actively involved with a number of local charities and community initiatives, supporting charities such as AgeUK Norfolk. This is our first full seminar covering the subject of Dementia, which has developed following our commitment to supporting Dementia Friendly communities and hosting Dementia Awareness sessions.

Services we provide in Norfolk

- **Information, advice and advocacy**
- **Money Matters & Advocacy**
- **Befriending service**
- **Dementia Cafes**
- **Award winning Dementia Friendly Communities**

Dementia Awareness Training

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Dementia Awareness

A dementia friendly Business /
Community

A Dementia Aware Business

- ❖ Each business is unique
- ❖ To be dementia aware you need to apply what is right for your business

Things to know about dementia



Do not call me a sufferer

People experience their dementia in different ways

Dementia can affect anyone

There is currently no cure



Dementia is
an umbrella
term for
diseases of
the brain



Dementia is not
a normal part
of aging



One of the
biggest things
to be affected
is confidence

- **MEMORY**
- **CONFUSION**
- **MOOD**





**Creating a Dementia
Friendly Business**



**Putting it all into
practice**



Way out →

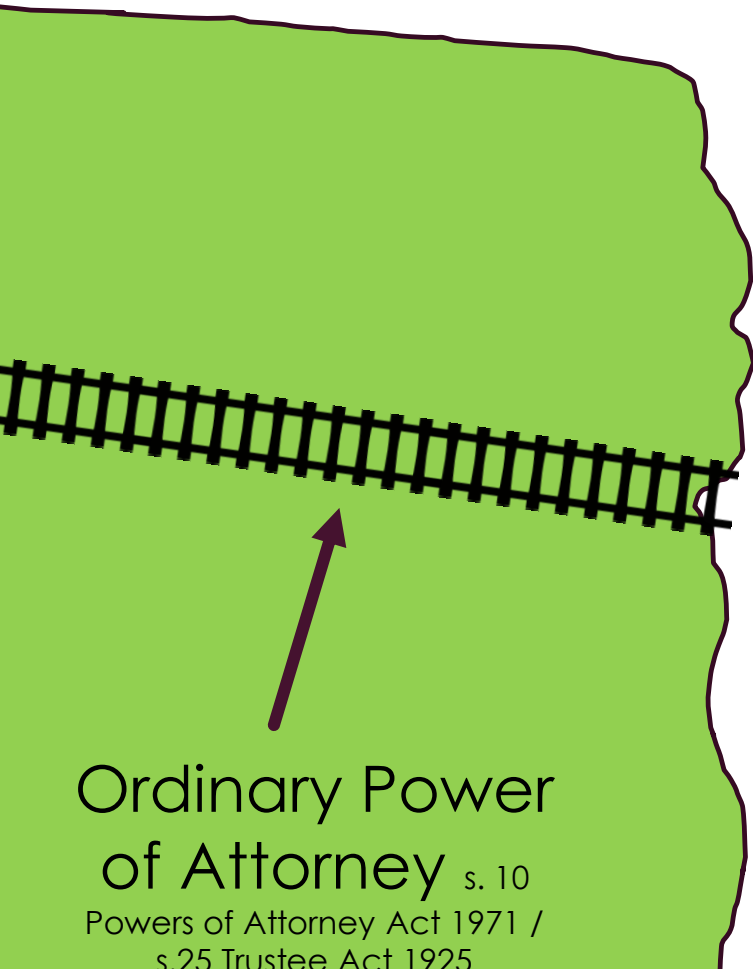
LAUREN ABBS

Solicitor
Wills, Trusts and
Probate Department



LEGAL IMPLICATIONS OF DEMENTIA

- At some point, a person with dementia may reach the stage where they are unable to make some decisions themselves
- If this happens, they will need someone to take care of their finances for them and also make health and welfare decisions on their behalf
- No one will legally be able to do these things on a persons behalf unless they have specifically been given legal authority to do so, either by:
 - Power of Attorney (while the person still has the requisite mental capacity); or
 - by Deputyship Order (when a person has lost mental capacity without making a Power of Attorney)



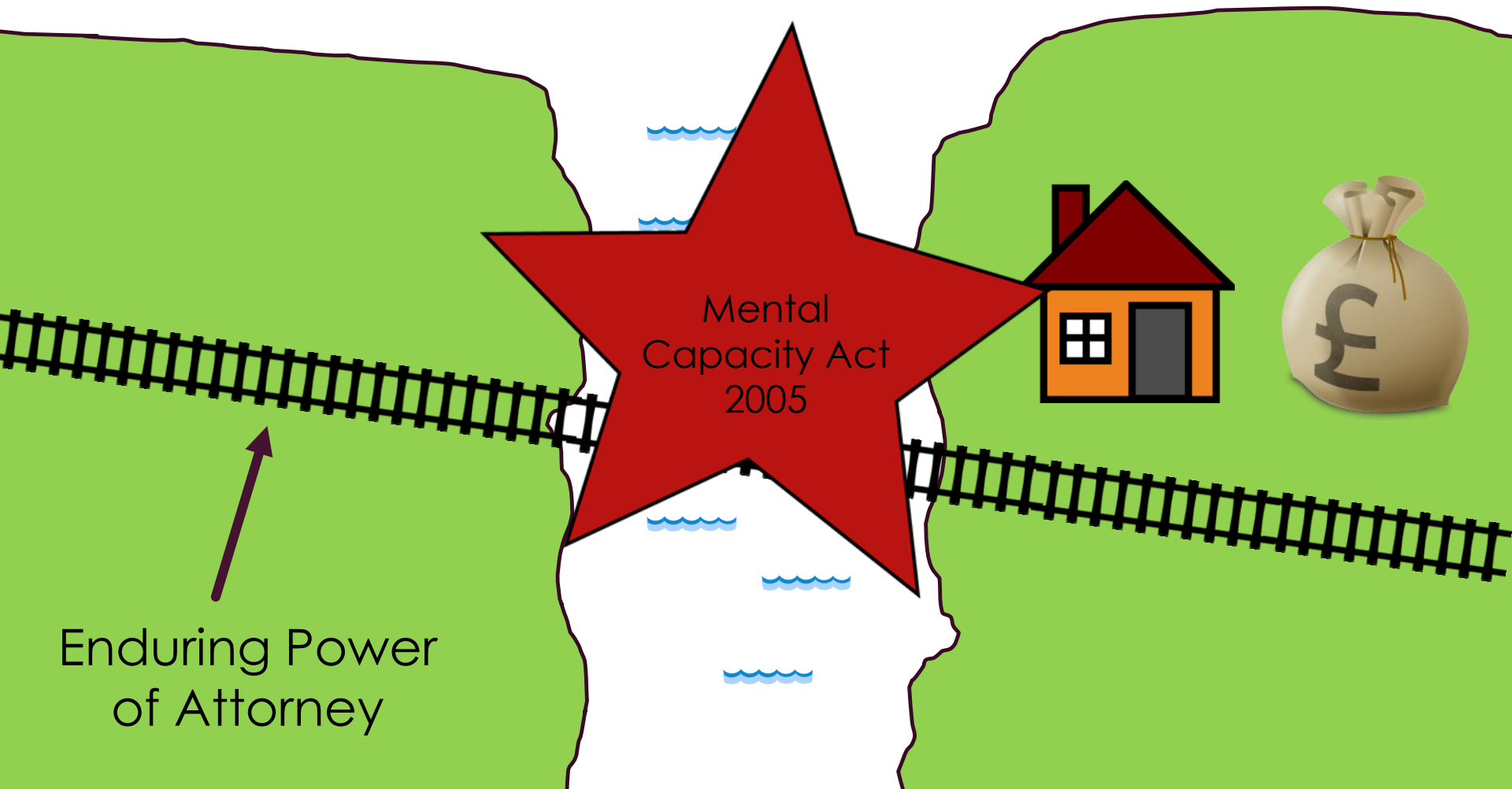
Ordinary Power
of Attorney s. 10
Powers of Attorney Act 1971 /
s 25 Trustee Act 1925

ORDINARY POWER OF ATTORNEY

- Can be used straight away
- Major limitation – the power granted will come to an end if the donor loses capacity
- Sometimes appropriate as a “stop gap” whilst drafting a more appropriate power of attorney

Mental
Capacity Act
2005

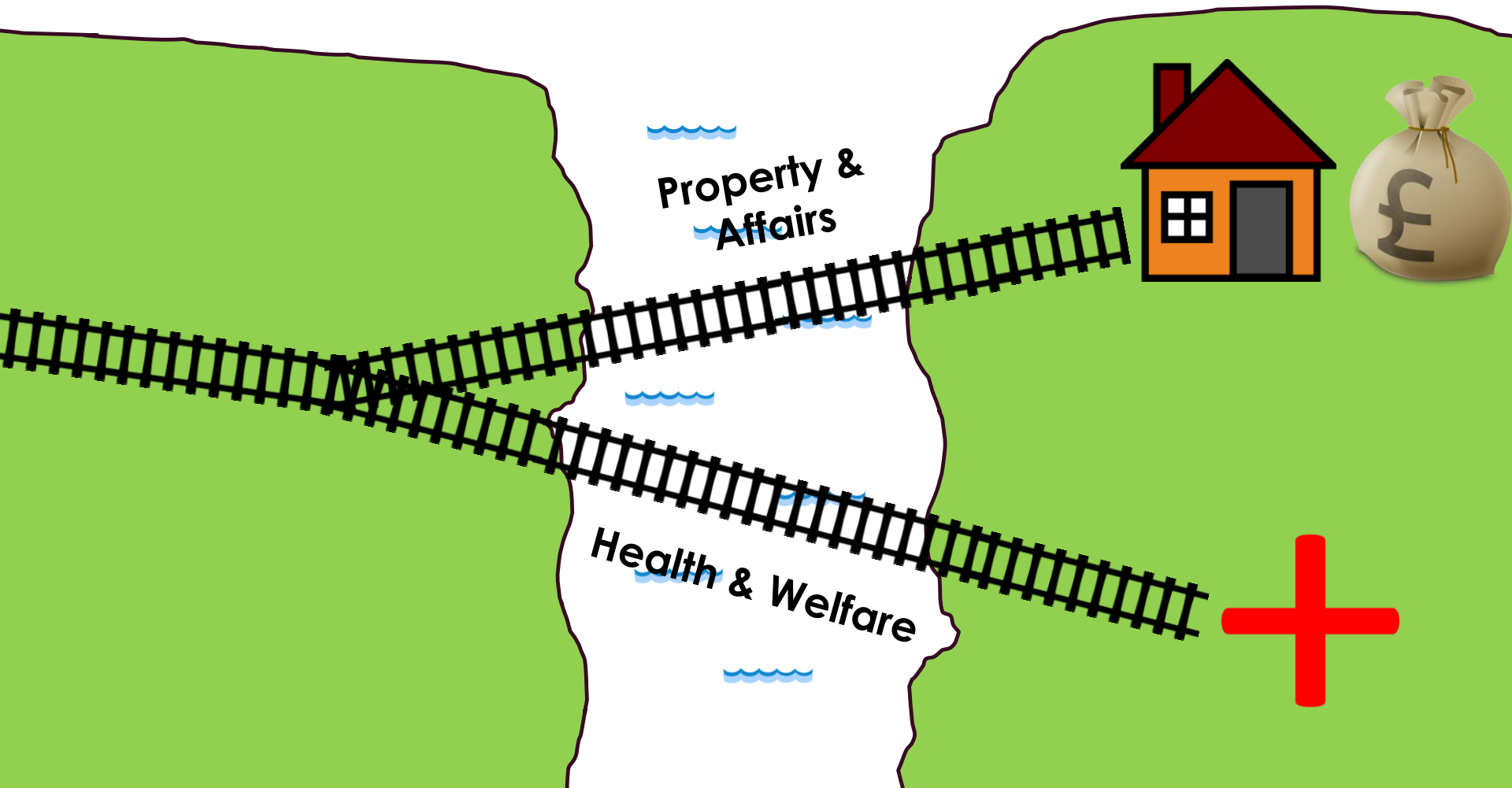
Enduring Power
of Attorney



ENDURING POWER OF ATTORNEY

- Existing EPAs can still be used, provided they were created before 1 October 2007
- Financial decisions only
- EPA must be registered as soon as the donor starts to lose mental capacity

LASTING POWERS OF ATTORNEY



LASTING POWER OF ATTORNEY

- The “new regime”
- Can be made while a person still has capacity to understand the power they are giving to their attorneys
- A diagnosis of dementia is not a bar to making an LPA; although, depending on the circumstances, it may be necessary for the individual’s GP to confirm their understanding

PROPERTY AND FINANCES

- Buy and sell property
- Open, close and operate bank/building society accounts
- Access financial information
- Claim, receive and use on the person's behalf benefits, pensions & allowances
- Receive income, inheritance and or other entitlement on behalf of a person
- Deal with the person's tax affairs
- Paying the person's mortgage, rent and household expenses
- Insure, maintain and repair the person's property
- Invest savings
- Pay for private medical care, residential care or nursing home fees
- Applying for NHS care funding, social care or adaptations
- Buy appropriate vehicle or other equipment they need
- Repaying loans, liabilities

HEALTH AND WELFARE

- Where the donor should live and who they should live with
- The donor's day-to-day care, including diet and dress
- Who the donor may have contact with
- Consenting to or refusing medical examination and treatment on the donor's behalf
- Arrangements needed for the donor to be given medical, dental or optical treatment
- Assessments for and provision of community care services
- Whether the donor should take part in social activities, leisure activities, education or training
- The donor's personal correspondence and papers
- Rights of access to personal information about the donor, or complaints about the donor's care or treatment

PREFERENCES

What you would like your attorneys to consider - helpful guidance.

- Property and finances:
 - Invest in ethical funds
 - Maintain a minimum balance of £X in my current account

- Health and Welfare:
 - End of life treatment – important guidance
 - “...I would prefer to live within X distance of my sister...”
 - “...I would like my attorneys to explore all possibilities of allowing me to remain in my own home/ to remain with my spouse...”

INSTRUCTIONS

Things your attorneys must do. Consider:

- Authority for the attorneys to have access to your Will
- Authority for the attorneys to use discretionary management schemes
- Authority for professional attorneys to charge for managing your affairs

But otherwise avoid instructions where possible. Your attorneys need the flexibility to act in your best interests.

FORMALITIES

- LPAs must be signed by the donor, a 'certificate provider' and the attorney(s) in a specified order.
- LPAs must be registered with the Office of the Public Guardian before they can be used at all.
 - Compare EPAs
- Property and Financial Affairs LPA can be used:-
 - with consent if the donor has capacity
 - at any time if they do not.
- Health and Welfare LPA:-
 - can only be used if the donor lacks capacity

APPOINTMENT OF ATTORNEYS

- Attorneys must be appointed to act jointly or jointly and severally (or a combination of the two).
 - Jointly
 - Jointly and 'severally' (i.e. independently of each other)
 - Jointly on some things, severally on others.
- There are some counter-intuitive rules concerning who can be appointed and how.
- Re Druce 2011, and OPG v Boff 2013

BEST INTERESTS

- An attorney has important duties and responsibilities, which are set out in the Mental Capacity Act 2005 and explained in the Code of Practice.
- An attorney must always act in the donor's best interest and, in order to do this:
 - Consider the person's past and present wishes and feelings, beliefs and values
 - Where practical and appropriate consult with:
 - Anyone caring for the donor
 - Close relatives and anyone else with an interest in their welfare
 - Other attorneys appointed by the donor
 - Always check whether the donor has the capacity to make a particular decision themselves. An attorney can act if the donor does have capacity if they have asked you to act and there are no restrictions in the LPA, but you should encourage the donor to participate.
- Only make those decisions the LPA gives you authority to make

DUTIES

An attorney has a duty to:

- Apply standards of care and skill when making decisions
- Carry out the donor's instructions
- Not take advantage of the position and not benefit themselves, but benefit the donor (fiduciary duty)
- Not delegate decisions, unless authorised to do so
- Act in good faith
- Respect confidentiality
- Comply with the directions of the Court of Protection
- Not give up the role without telling the donor and the court
- Keep accounts
- Keep the donor's money and property separate from their own
- In relation to end of life decisions, not be motivated by the desire to bring about the donor's death

MEET DAVID



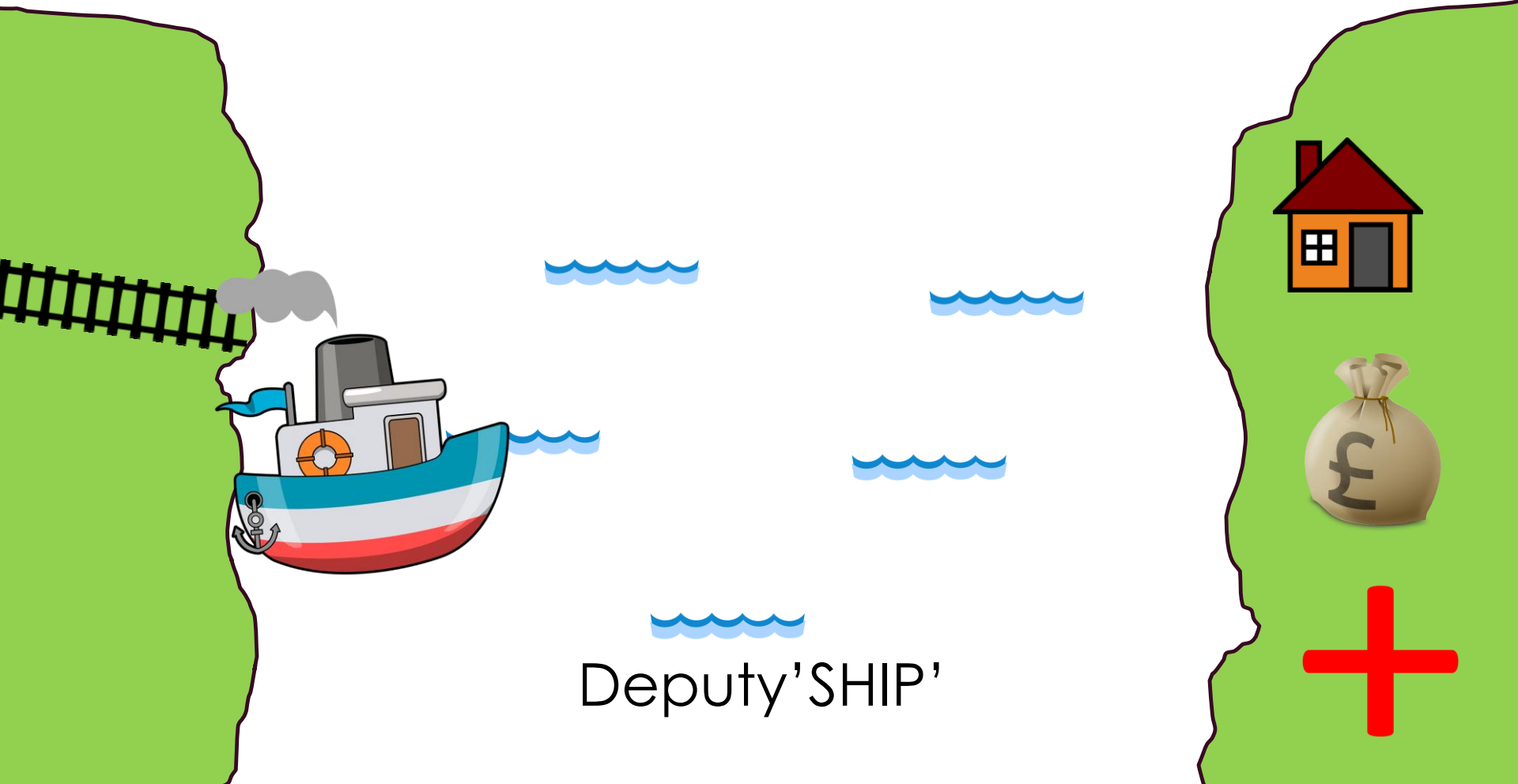
- David's Will contains the following legacy: "I give my Barclays account number 123 to such as my nephews as survive me in equal shares"

MEET VICTOR AND MARGARET



- Victor was attorney for his wife, Margaret, who lacked capacity.
- Victor had been in habit of placing 'his money' in his wife's bank account.
- Victor withdrew half of the proceeds of one of his wife's accounts (which he considered to be his) and purchased a house with it.
- Victor died. In his will, he left the house to his cleaner.
- Victor's replacement attorney objected, claiming that the gift of the account proceeds was unauthorised.
- The cleaner agreed a variation of the Will so that the house passed to Margaret.

LASTING POWERS OF ATTORNEY



Deputy'SHIP'

DEPUTYSHIP

- Where a person no longer has sufficient capacity to make LPAs, the person who would like to act on their behalf would need to make an application to the court for a Deputyship Order.
- The application process is longer as the application is subject to a higher level of scrutiny than an application for an LPA – the person who lacks capacity is considered vulnerable and is not freely giving the power away.
- There are several forms to complete and the application takes approximately 26 weeks.
- A deputy is only able to make decisions that are authorised by the Court and may need to apply to the court from time to time for additional powers, for example, to sell a house.
- A deputy is supervised by the Court and must produce annual accounts and a surety bond is generally required to protect the assets of the person whose affairs and property the deputy is managing

WILLS AND ESTATE PLANNING

- Gifts from a vulnerable person
 - What if a person does not have capacity to sign a Will?
- Gifts to vulnerable people
 - Family and friends should take appropriate advice when making gifts to a vulnerable person
 - This is not something which can be retrospectively “undone”

MEET DEMELZA AND ROSS



- Demelza and Ross are married with two children. They have a Will which leaves everything to one another outright.
- Ross decides that he no longer loves Demelza and leaves her for his childhood sweetheart Elizabeth – they separate but they do not divorce.
- Demelza does not update her Will.
- Demelza's mental capacity deteriorates and, as time goes on, she requires full-time care, which her son provides.
- Demelza no longer has capacity to make a Will and, based on the terms of her current Will, her whole estate will pass to Ross upon her death.
- In the circumstances, this is probably not what she would want to happen if she had the capacity to decide for herself and, therefore, an application is made for a statutory Will.

MEET HOWARD AND HILDA



- Howard and Hilda are married with two children. They own their home and have some savings.
- They are a loving family unit and always want to look after each other.
- Howard and Hilda have worked hard their whole life and have paid off their mortgage. It is very important to them that they provide an inheritance for their children.

HOWARD AND HILDA'S WILL

- **Option 1** - They provide for each other in their Wills and when the second of them dies, everything must be divided equally between their children.
- **Option 2** – They own their home jointly as “tenants in common”, provide one another with a “life interest” in the half share of the home belonging to the first of them to die and gift everything else to the survivor outright. Upon the survivor’s death, the half share of the property belonging to the first of them to die is divided equally between their children. Everything owned by the survivor is divided equally between the children.

HOWARD AND HILDA'S STORY



- Howard dies very suddenly
- Hilda is lost without Howard, her health deteriorates and she moves into long term care
- Hilda's health improves and she lives for another 20 years 😊
- **Option 1** - Upon Hilda's death, she has very little money to leave to the children
- **Option 2** – Upon Hilda's death, although Hilda has very little money left herself, Howard's half share of the proceeds of sale of their home has been protected and can pass to their children

OVERALL

- Plan ahead
- A diagnosis of Dementia does not necessarily mean that it is too late to put legal documents in place – of course, it is important to act promptly
- If you have a loved one who no longer has the mental capacity to make decisions for themselves, it is important to ensure your own legal documents are in order to protect your family in the future – don't forget yourself.

FORTHCOMING BRIEFINGS 2017

- Charities Briefing – February
- Contested Probate Briefings - March

THANK YOU

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